Arkansas Department of Education
Special Education Unit

IN RE:

X..... X.....
as Parent in behalf of
X..... X....., Student PETITIONER

VS. NO. H-13-02

Benton School District RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

Issues and Statement of the Case

Issues:

The Petitioner alleges that the Respondent denied the Student with a free and appropriate public education (FAPE) during school year 2011-12 by:

1. Not providing the Student with an appropriate Individualized Education Program (IEP);
2. Failing to provide the Student with a dedicated aide;
3. Failing to properly accommodate the Studentôs medical needs;
4. Failing to provide for the Studentôs safety and well-being during school hours; and by
5. Failing to follow due process procedures, specifically by not providing adequate Parent participation.

Procedural History:

On July 24, 2012, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the ñDepartmentò) from X..... X..... (hereinafter referred to as ñParentò), the parent and legal guardian of X..... X..... (Petitioner) (hereinafter referred to as ñStudentò). The Parent requested the hearing because she believes that the Benton School District (hereinafter referred to as ñDistrictò) failed to comply with the Individuals with Disabilities Education Act of 2004 (20 U.S.C. §§ 1400 - 1485, as amended) (IDEA) (also referred to as the ñActò and ñPublic Law 108-446") and the regulations set forth by the Department by not providing the Student with appropriate special education services as noted

above in the issues as stated.

The Department responded to the Petitioner's request by assigning the case to an impartial hearing officer and establishing the date of August 30, 2012, on which the hearing would commence should the parties fail to reach a resolution prior to that time. An order setting preliminary timelines with instructions for compliance with the order was issued on July 25, 2012.[1] The District filed a response to the notice of the hearing request on July 31, 2012.[2] The Parent requested the services of a mediator. The District notified the hearing officer on August 19, 2012, that a mediation conference was conducted; however, without resolving the issues contained in the Petitioner's complaint.

On August 22, 2012, the Petitioner filed a request for continuance, which was granted, with objection by the Respondent. The hearing was ordered to begin on September 20, 2012.[3] The hearing began and ended as scheduled on September 20, 2012.

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended, and Arkansas Code Annotated 6-41-202 through 6-41-223, Robert B. Doyle, Ph.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. The Parent was represented by an advocate, Emily Kearns, of Little Rock, Arkansas, and the District was represented by Pamela Osment, Attorney of Conway, Arkansas.

At the time the hearing was requested the Student was a seven-year-old student, with multiple medical issues including cerebral palsy, a seizure disorder, and osteoporosis. The District assumed the educational responsibility for the Student when she was enrolled by the Parent into the District's kindergarten program for school year 2011-12. In so doing the District has acknowledged that the Student is a child with a disability as defined in 20 U.S.C. §1401(3). The Student's disabilities as related to the above medical issues including gross developmental delay to include speech as well as fine and gross motor skills.

Since the Petitioner was challenging the appropriateness of the Student's IEP the burden of

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[1] Hearing Officer Exhibit 1

[2] Hearing Officer Exhibit 2

[3] Hearing Officer Exhibit 3, 4, & 5

proof was to be born by the Petitioner. It was explained to both parties at the beginning and again at the conclusion of the hearing that the decision reached by the Hearing Officer would be based only on the testimony and evidence presented at the hearing. Both parties were offered the opportunity to provide a closing statement as well as a post-hearing brief. The Petitioner elected to provide a closing statement but not a post-hearing brief and the Respondent elected to provide a post-hearing brief and not a closing statement. The Respondentôs post-hearing brief is included as Hearing Officer Exhibit Number Six.

Findings of Fact:

During school year 2011-12 did the District deny the Student with FAPE by:

1. **Not providing the Student with an appropriate Individualized Education Program (IEP);**
2. **Failing to provide the Student with a dedicated aide;**
3. **Failing to properly accommodate the Student's medical needs;**
4. **Failing to provide for the Student's safety and well-being during school hours; or by**
5. **Failing to follow due process procedures, specifically by not providing adequate Parent participation?**

1. The appropriateness of the IEP for the Student's school year 2011-12:

The IEP developed on June 8, 2011, was the initial education program designed for the Studentôs kindergarten school year 2011-12.[4] The record reflects that the Parent was notified and in attendance on the date the IEP was developed. In addition to the 1,644 minutes of special education services she was scheduled to receive in reading, written language, functional math, science, social skills, and social studies, the IEP programed for her to receive physical education, library, music, and computer tech in a regular education setting for a total of 581 minutes per week. She was also scheduled to receive speech therapy each week for sixty minutes, as well as occupational therapy and physical therapy twice weekly for sixty minutes each. The Studentôs IEP

[4] District Binder, Page C22-41

indicated that she required the use of a wheel chair, a helmet, and had to be fed through a feeding tube.

In addition to the IEP an Individual Health Care Plan (HCP) was developed by the school nurse on August 11, 2011, to accommodate the medical needs of the Student.[5] The HCP was signed by the Parent, the nurse, and the school principal. The medical diagnoses listed in the HCP included cerebral palsy with spastic quadriplegia, swallow dysphagia, global developmental delay, chronic reflux and cataracts. Given that the Student was at risk for seizures, the HCP also called for the implementation of seizure precautions in the wearing of a safety helmet. The HCP indicated that the school nurse provided CPA/AED training to the Studentôs classroom teacher as well as the classroom aides.

On August 18, 2011, and emergency plan was developed by the school nurse which provided information for the classroom teacher and aides with information on when and who to contact in case there was a student-specific emergency.[6] The school nurse also developed a plan for classroom modifications in case the Student experienced a seizure, with instructions for each individual involved in the Studentôs care.[7] On August 10, 2011, the school nurse provided the school personnel involved in the Studentôs daily activities with information regarding cerebral palsy as well as information regarding the type of feeding tube the Student required.[8]

The adverse affect of the Studentôs agreed to disabilities and the impact they have on her obtaining an education was not disputed. However, the Parent contends that the District has failed to provide an appropriate IEP to address the educational and medical needs of the Student. The experience and credibility of the witnesses requested by the Petitioner were never disputed, nor does the evidence and testimony indicate that such a challenge would stand. The Districtôs director of special education services testified on direct examination that the disability challenges

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[5] District Binder, Page G2-3

[6] District Binder, Page G4

[7] District Binder, Page G5-9

[8] District Binder, Page G11-13

presented to the them by the Student ñare not anything our district canôt handle.ò[9] She further testified that the special needs presented by the Student were not new to the District and that they have provided educational opportunities for students with similar disabilities.[10]

Other than not being able to have included in the Studentôs IEP a specifically designated one-on-one aide to be assigned solely to the Student all day, every day, the Parent did not challenge in testimony, nor present through evidence, that the Studentôs IEP was inappropriate. In addition to the lack of a one-on-one aide not being included in the IEP, what was challenged through testimony was how the IEP team made their final decision as to what was needed in the IEP in order to provide the Student with an opportunity to receive a free and appropriate education. The Parent testified that she had attended ñsix conferences trying to get a one-on-one aide for my daughterò and that ñat every conference, itôs like ôWe will have them,ô but there is nothing ever solved.ò[11] On direct examination the Districtôs director of special education testified as to the process of how an IEP team reaches a decision: ñThe team is an individualized process, it depends on the student....in this case, it looks like it was me, the assistant principal, the speech path, the occupational therapist, the parent, the special education teacher, and ...the music teacherò and that ñ..... everybody participates in this discussion and itôs an open discussion..but when it comes down to the final determination on the educational program, the district is going to make recommendations, and if the parent doesnôt think the recommendations are appropriate, then they can take their venues to appeal that process.ò[12] On further being asked ñwhen a team makes a decision and youôve got, you know, six people on a team, if four people say óyesô and three people say óno, or two people say ónoô, then majority rules...how does it work?ò she replied ñthat does not apply to IDEA standards...the IEP process is not a vote...itôs not a unanimous decision... itôs an open process, you discuss with everybody at the table the concerns...but in the end, the educational

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[9] Transcript, Page 28

[10] Ibid, Page 28

[11] Transcript, Page 117

[12] Ibid, Page 35-36

decision falls back on the school.ò[13]

The Studentôs classroom teacher testified that she observed progress in the Studentôs ability to increase her visual attention, even though her ability to sustain attention was significantly impaired.[14] She further testified that the Student made progress overall in spite of a significant number of absences, and that should she be returned to her classroom that she would continue to make progress under the IEP as developed.[15] The Parent testified that she did not expect the Student to make enough progress ñto live on her ownò and that in her opinion that the Student will have to have ñsomeone to look out for her all the time.ò[16] She went on to state that the Student has ñnever been able to do anythingò by herself, and that she ñcan barely even sit up by herself.ò[17] She testified that she disagreed with the District in stating that the Student had made progress, but presented no basis for the allegation.

After a review of the documents presented as the IEP and the HCP, as well as testimony by the District staff involved in its development and implementation, the Parent has failed to show that the IEP as developed was not appropriate to meet the educational and health needs of the Student.

2. Did the District fail to provide FAPE by not providing the Student with a dedicated aide?

As noted above the Parentôs primary concern from the beginning to the end of her involvement in the development of the Studentôs IEP was for her to have a one-on-one aide specifically assigned to her and only her for the entire school day. The Parent believed that the Studentôs frail medical condition and issues warranted such a person to be with her child at all times. In testimony she recounted several incidents which were not disputed by the District that were examples of why the Student needed such an aide: ñOn several times, I sent e-mails saying

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[13] Ibid, Page 43-44

[14] Ibid, Page 82

[15] Ibid, Page 109-110

[16] Ibid, Page 120

[17] Ibid, page 120-121

[the Student] didnôt get [her] jacket on, and they would just put them in [her] backpack...[she] would continue to keep colds, because [she is] ...disabled, her system, she gets sick easy, and I would continually take her to the doctor, and she would end up missing out [on her education] due to her health.ò[18] She also believed that due to the Studentôs diagnosis of a seizure disorder that this diagnosis alone constituted a need for a one-on-one aide, stating that ñbecause of [the Student] having more seizures, she is on six different seizure medications...because she has seizures for a very long time sometimes...I feel that she needed a one-on-one aide.ò[19] The Parentôs apprehension was expressed on direct examination in stating that ñshe is total care..this is how she will be for the rest of her life...she has to have someone to look out for her all the time..she will never be able to live on her own or do like normal children.ò[20]

The Parent introduced evidence which showed that the District had requested additional funding from the Department due to the catastrophic need for the Student and her twin sister with similar disabilities.[21] The funding as explained by the Districtôs director of special education was to supplement the cost to the District for one of the aides in the classroom who splits her time between the Student and her twin sister. She further explained that even though the document introduced as evidence was that of her twin sister, there is an identical one on record for the Student.[22] By looking at the document it would appear that the funding was being requested for a specific paraprofessional (aide) to provide services specifically for the Student. In explaining the document the Districtôs director of special education testified that: ñWhat we do on the IEPs is, we describe the supports and services the student needs..so, if they need total assistance for feeding, for toileting, for transport, thatôs how we describe it...and then, based on those personal care logs, the amount of time that that takes is how we get to that time..when you re going for catastrophic reimbursement, you have to assign an employee number to that..and thatôs what we do...but how

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[18] Ibid, Page 118

[19] Ibid, Page 119

[20] Ibid, Page 120

[21] Parent Exhibit, Page G1-G4

[22] Transcript, Page 61

[the classroom teacher] assigns her three paraprofessionals, thatôs her flexibility as a supervisor for that classroom..we just make sure weôve got the support staff in there.ò[23] Later in testimony she stated in response to the assigned duties of the aide for which the funding was requested that: ñyou donôt get the whole reimbursement..it doesnôt look like that..you look at a funding ratio..and at the lowest ratio to staff is one to six with a paraprofessional..we staff our classes with one teacher and three paraprofessionals in there because of the severity needs of kids..and so, when you get high cost kids that take additional staff, the State Department has issued this program where you can seek reimbursement for those services..but you donôt get the full reimbursement of the service....you get a prorated amount, if you are approved..and the approval process comes through this submission and then Easter Seals comes to do an onsite review of the folder, they look at the student, they interview the staff to make sure itôs a legitimate claim.ò[24] Even with this extensive explanation of the Districtôs request for catastrophic funding, it did not satisfy the Parent. The Parent continued to insist that the aideôs name used to solicit additional funding for the costs incurred by the additional needs of the her child warranted that particular paraprofessional being designated on the Studentôs IEP as the one-on-one aide to be with her all day, every day during the course of her educational activities.

The Parent introduced additional evidence from non-education professionals who requested that the Student be assigned a one-on-one aide. The Student was seen by a physician on February 27, 2012, at Childrens Hospital in Little Rock. The physician stated in an order ñplease provide patient with a personal care aide when at school. Aide should be able to assist with suctioning patient as needed, with diapering, and assist with feedings.ò[25] The Districtôs school nurse testified when asked about the doctorôs order that ñwe had a meeting following this, and I had asked Mom, ôDo we have suctioning?ô she told me, yes, they have a suctioning machine, but she was not comfortable with the school having it because she said when they educated her on things that could go wrong just form the suctioning, she just didnôt use it, she chose to bulb syringe suction, just a

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[23] Transcript, Page 63-64

[24] Ibid, Page 65

[25] Parent Exhibit, Page C4

bulb syringe.ò[26] This element of the testimony was never disputed by the Parent. The school nurse further testified that she trained all of the paraprofessionals in the use of the bulb syringe, but that to her knowledge it had become necessary only once during the school year and even then she could not recall if it was for the Student or her twin sister. She also testified that she included an update to the Studentôs HCP which stated that the Parent would provide a bulb syringe for as needed suctioning of excessive secretions, nasal or oral, and the nurse will train the paraprofessionals on the use of the bulb syringe.[27] The classroom teacher testified that when the Student needed a diaper change that it took two of the three aides in the classroom to perform the task ñbecause for safety purposes and to be able to lift her properly and put her on a changing table.ò[28]

With regard to the doctorôs order for assisting in the Studentôs feeding the Districtôs school nurse testified that following each morningôs diaper change she hooked up the Studentôs feeding tube and then two hours later returned to disconnect the tube. During that two hour period of time the Student received her educational programming from the classroom teacher and the other three aides. The nurse testified that she was on call during that two hour period of time should an emergency arise with the feeding tube. She performed the same feeding routine at noon and again returned two hours later to disconnect the feeding tube.[29] It would appear that the doctor initiating the order was unaware of the process in place to assist the Student with her need for suctioning, diapering, or feeding. The Parent, however, interpreted this order to mean that the Student needed to have one person designated as the Studentôs one-on-one aide to assist in the process of suctioning, diapering, and feeding and that it should have happened simply because it was ordered by a physician.

The Parent also interpreted the meaning of a letter from another one of the Studentôs physicians at Childrens Hospital in March 2011, to mean that she needed a one-on-one aide, even

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[26] Transcript, Page 181

[27] Transcript, Page 184-185

[28] Ibid, Page 100

[29] Ibid, Page 159

though the document simply states that the Student ñwould benefit from a classroom aid.ò[30]

The Studentôs classroom teacher testified that her classroom included seven other students with special needs and that in addition to herself she supervised the activities of three paraprofessionals in providing those services. She further testified that all of the Studentôs needs, including her health needs, were being met with the staff assigned, even though the Parent had made it clear to her that she was not happy with anything that she, as a teacher, had done for the Student with regard to teaching or providing related services.[31]

The testimony and evidence does not support the Parentôs contention that the District failed to provide FAPE by not providing her a one-on-one aide as she understood and believed to be needed for the education of the Student.

3. Did the District fail to provide FAPE by not properly accommodating the Student's medical needs;

As noted above under the challenge to the IEP, a health care plan (HCP) was developed by the Districtôs school nurse which outlined all of the Studentôs medical needs as diagnosed by the Studentôs physicians, and how the District would be addressing those needs while the Student was in attendance at the school. Also as noted above she testified that she personally participated in the training of all of the educational professionals, including the classroom aides, in how to manage the Studentôs health needs.

The Parent focused on the fact of the significant number of physical maladies and challenges that the Student presented with in an educational setting and asserting that given those challenges that, in her opinion, the District had not and was not able to provide for the Studentôs medical needs. The Parent failed to provide documentary evidence or testimony to show that the Districtôs plan and subsequent enactment of that plan did not or could not properly accommodate the Studentôs medical needs. When asked on cross examination as to what medical needs she believed

[30] Parent Exhibit C6

[31] Transcript Page 109-110

that the District had not met the Parent replied ña one-on-one aide.ò[32] When challenged further she testified that she had ñnever seen the staff wash their handsò and ñhaving a guinea pig in the room with children with open wounds is unsafe.ò[33] No evidence was provided to substantiate the Parentôs allegation with regards to unwashed hands or the guinea pig.

The Parent has not shown through evidence or testimony that the District has denied the Student with FAPE by failing to properly accommodate for the Studentôs medical needs.

4. Did the District fail to provide FAPE by not providing for the Student's safety and well-being during school hours?

The Parent did not present any evidence to show that the District was not or could not provide for the safety and well-being of the Student during school hours. In testimony the issue of safety was addressed only three times. First, by the Studentôs classroom teacher when she was describing the safety precautions necessary for the use of two aides in changing the Studentôs diapers.[34] Second, by the Parent in her testimony when she expressed concern about the possibility of the District employing a school nurse that was previously involved in a safety issue with the Student prior to coming to the District.[35] And third, by the school nurse when she testified to her contact with the Studentôs nurse at Childrens Hospital and being able to obtain medical information in order for her to develop the Studentôs ñcare plans and safety emergency plans.ò[36]
The Studentôs well-being was never addressed outside the Parentôs opening statement and the allegation that the District had failed to provide it for the Student.

Given the lack of evidence and the lack of testimony it has to be concluded that the Parent has failed to show that the District did not or could not provide for the safety and well-being of the Student.

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[32] Transcript, Page 122 and 129

[33] Ibid, Page 129-130

[34] Transcript, Page 100

[35] Ibid, Page 118-119

[36] Ibid, Page 177-178

5. Did the District fail to provide FAPE by failing to follow due process procedures, specifically by not providing adequate Parent participation?

The evidence introduced by the District included a notice of conference signed by the Parent on March 31, 2011, indicating that she would be attending a conference that same day for the purpose of determining the appropriate services for the Student when she entered the District as a kindergarten student for school year 2011-12.[37] She also acknowledged on that date that she had received a copy of her rights under IDEA as well as information of available sources to help her understand her rights.[38] On June 8, 2011, the Parent acknowledged receipt of a notice of conference held that date for the purpose of determining the services in the development of an IEP for the Studentôs kindergarten year.[39] Once again she acknowledged with her signature that she received a copy of her rights under the IDEA, and again that she was made aware of the available sources that she could use in order to better understand those rights.[40] She also acknowledged on that date that she had received a copy of the Studentôs evaluation as well as the proposed educational and related services that the Student would be receiving for school year 2011-12.[41] In testimony the Parent did not deny having received notice and having attended the conferences. She testified that she was active in the discussion with specific concerns stated about the possible employment of a nurse that she had concerns about based on previous encounters and apprehension that this person would be responsible for implementing the health care portion of the Studentôs IEP, in particular the Studentôs seizure disorder precautions. She testified when asked about her concerns pertaining to this person that on ñJune 6th we had a meeting, and [the Districtôs director of special education services] knew from 2011 that there was a nurse that I was friends with, not just at the day care, but outside of the day care...I pulled my children from this day care because [the Student] had a seizure May 18th and I was never called...and I have had four family members die of

[37] District Exhibit, Page B4-5

[38] Ibid, Page B6

[39] Ibid, Page B14

[40] Ibid, Page D15

[41] Ibid, Page D17

a seizure..and [the Districtôs director of special education services] knew all of that...and June 6th, we had an IEP conference and she was talking about bringing this particular nurse in.ò[42] At this same conference she also expressed her desire and opinion that due to the potential danger of the seizures that the Student required a one-on-one aide with the duties and responsibilities as she deemed necessary to maintain the Studentôs health.[43]

The evidence presented shows that the nurse for which the Parent expressed concern was not employed. The school nurse employed was responsible, as noted above in issue number one, for the development of the Studentôs Health Care Plan (HCP) and an emergency plan; as well as the training of the classroom teacher and the three aides assigned to the Studentôs classroom. The Parent acknowledged receipt of the HCP on August 11, 2011, prior to the Studentôs first day in school.[44] The Parent provided the District with information pertaining to the Studentôs seizure medication and how to respond in case of an emergency on August 13, 2011.[45] On September 21, 2011, the Parent acknowledged receipt of a notice of conference held on that day.[46] The noted purpose for the conference was ñMom has a family history of serious seizure disorder.ò It further notes that ñMom is concerned that because [the Student] has [a] seizure disorder there is not enough supervision for [the Student].ò The decision reached by the IEP team was that ñall CBI staff (K-5) will review seizure protocols and signs. Staffing ratios and school choice were also discussed.ò[47]

The next IEP conference was held on February 21, 2012, with the Parent acknowledging receipt of the notice on that same date; however, with a volunteer attorney to represent her having acknowledged receipt of the notice on February 14, 2012. Two volunteer attorneyôs were present to represent the Parentôs stated concerns. Those included having an individual paraprofessional

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[42] Transcript, Page 118-119

[43] Ibid, Page 119-120

[44] District Exhibit, Page D3

[45] Ibid, Page G16-17

[46] Ibid, Page B21

[47] Ibid, Page B22

assistant for the Student; the Parentôs concerns regarding the Studentôs level of treatment/supervision (soiling of clothing/not putting coats on) at school; as well as the provision of physical therapy services and concerns over the Studentôs g-tube removal.[48] Also discussed at the meeting was the Studentôs attendance in school and the Districtôs need for medical documentation for her absences. The Parent agreed to notify the District after she made a determination regarding the provision of services and the Studentôs IEP was changed regarding attendance to reflect flexibility with the compensatory attendance laws because of the Studentôs chronic medical conditions.[49]

On March 16, 2012, the Parent acknowledged receipt of a notice of conference to be held on that date. The record reflects that she participated on the IEP team. The previously discussed doctorôs order for an aide in the classroom to assist the Student with suctioning, feeding, and diapering was discussed; as well as physical therapy services.[50]

On June 6, 2012, the Parent acknowledged receipt of a notice of conference to be held that day to discuss the Studentôs need for extended school year services (ESY).[51] She also signed a consent to release the Studentôs education records to the agency which would be providing the ESY services. She acknowledged her presence in the discussion of those services which would include occupational therapy, speech/language therapy, and physical therapy being provided from June 11, 2012 through August 17, 2012.[52]

There was no evidence presented by the Parent to indicate that any of the above conferences did not take place and that she did not have the opportunity in each of them to participate. In each of these meetings she testified that she consistently asked for a one-on-one aide for the Student, but that she ñknew from the history, from first meeting [the Districtôs director of special education], it was never going to happen, because we butted heads from when we first

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[48] Ibid, Page B28

[49] Ibid, Page B28-29

[50] Ibid, Page B33

[51] Ibid, Page B34

[52] Ibid, Page 37-38

met.ò[53]

Adequate participation for the Parent in the IEP conferences would appear from the testimony was whether or not she had a vote on the issues and whether or not the District agreed with her with the Student needing a classroom aide being specifically assigned (one-on-one) throughout the school day. However, the record shows that the District did consider the Parentôs requests and did make some adjustments in the Studentôs IEP with respect to the Parentôs concern about the Studentôs seizures. At the same time, the issue of the one-on-one aide was shown through testimony by the witnesses that such a person in the classroom was not needed and that the District provided adequate personnel to handle the Studentôs special needs.

Conclusions of Law and Discussion

Part B of the Individuals with Disabilities Education Act (IDEA) requires states to provide a free, appropriate public education (FAPE) for all children with disabilities between the ages of 3 and 21.[54] The IDEA establishes that the term ñchild with a disabilityò means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who by reason of their disability, need special education and related services.[55] The term ñspecial educationò means specially designed instruction.[56] ñSpecially designed instructionò means adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery of instruction.[57] As noted in this case the Student presented as being a child eligible to receive special education services due to multiple medical conditions including developmental delay, fine motor delay, gross motor delay, speech delay, cerebral palsy, seizure disorder and osteoporosis.

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[53] Transcript, Page 119-120

[54] 20 U.S.C. § 1412(a) and 34 C.F.R. § 300.300(a)

[55] 20 U.S.C. § 1401(3)(A)

[56] 20 U.S.C. § 1402(29)

[57] 34 CFR § 300.26(b)(3)

The Department has outlined the responsibilities of each local education agency with regard to addressing the needs of all children with disabilities such as the Student in itôs regulations at Section 2.00 of Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education, 2008.

In 1982, the Supreme Court was asked and in so doing provided courts and hearing officers with their interpretation of Congress' intent and meaning in using the term "free appropriate public education" or FAPE. Given that this is the crux of the Parentôs contention in this case it is critical to understand in making a decision about her allegation as to whether or not the District failed to provide the Student with FAPE. The Court noted that the following twofold analysis must be made by a court or hearing officer with regard to FAPE:

> (1). Whether the State (or local educational agency (i.e., the District)) has complied with the procedures set forth in the Act (IDEA)? and
>
> (2). Whether the IEP developed through the Act's procedures was reasonably calculated to enable the student to receive educational benefits?[58]

In 1988 the Supreme Court once again addressed the issue of FAPE by emphasizing the importance of addressing the unique needs of a child with disabilities in an educational setting by addressing the importance of a districtôs responsibility in developing and implementing specifically designed instruction and related services to enable a disabled child to meet his or her educational goals and objectives.[59] In this case the Parent has alleged that the District did not consider the Studentôs unique needs by virtue of her belief that the Student needed a full time, one-on-one aide, to be specifically assigned to her, and to be with her throughout the entire school day, to which the District disagreed. She further alleged the inadequacy of the District to adequately provide for the Studentôs physical health issues as well as providing her with a safe environment.

Under the IDEA, an IEP team must ñconsiderò the results of evaluations or suggestions by a parent when developing an IEP. [60] The evidence in this case indicates that the District did in fact

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[58] *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 206-207 (1982)

[59] *Honig v. Doe,* 484 U.S. 305 (1988)

[60] 20 U.S.C. § 1414(d)(3)(A)(iii)

consider the all of the Parentôs concerns. However, as noted in the findings of fact the Studentôs IEP team, which included the Parent at all meetings, were satisfied with the level of staff to student ratio in the Studentôs classroom and took the necessary steps to prepare for any health emergency the Student might present with during the school day. The testimony and evidence also reflected the fact that the District did incorporate strategies into the Studentôs IEP suggested by the Parent.[61] In so doing they were addressing the unique needs as presented by the Studentôs disabilities.

Congress established and the courts have consistently agreed that FAPE must be based on the childôs unique needs and not on the childôs disability.[62] As is true in this case, too often this hearing officer has found that parents, school administrators and the legal counselors representing them, typically agree on the basis, but do not make this distinction in their arguments on the complaints or the differences theyôve encountered. The charge to education professionals is to concentrate on the unique needs of the child rather than on a specific disability. The District correctly addressed the Studentôs medical and health difficulties associated with her eligibility criteria.

In reviewing the elicited testimony and the evidence, in this case there is ample testimony and evidence that the District attempted to focus on the unique needs of the Student. They developed and implemented a Health Care Plan (HCP) designed to address the Studentôs multiple health issues. The records presented as evidence by the District shows that the plan was appropriately and successfully implemented during the course of school year 2011-12. Contrary to the Parentôs allegations there was insufficient evidence to show that the District failed to adequately prepare for and implement both the IEP and HCP to meet the unique needs of the Student. Despite the devastating manifestation of her health problems, the evidence also shows that in spite of her low level of intellectual functioning she made educational progress. Unfortunately, based on the educational science of learning her level of intellectual abilities will not progress to the degree of that wished for by either the Parent or the educators. However, this is not to suggest that either the Parent nor the District not continue to expect more and more from the Student with regard to developing her skills.

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[61] See *G.D. v. Westmoreland School District*, 930 F.2d, 942, 947 (1st Cir. 1991)

[62] 20 U.S.C. § 1400(d)(1)(A); § 1401(14); and 34 C.F.R. § 300.300(a)(3) (emphasis added)

It is necessary for this hearing officer to look only at the facts in this case as to whether or not the District, in cooperation with the Parent, developed an IEP which concentrated on the unique needs of the Student and not the Parentôs fears of what might happen and that the IEP team considered her unique needs in deciding on an appropriate educational placement to implement her education program in the least restrictive environment. The testimony by District personnel elicited in the course of the hearing suggests that they truly believed that the unique needs of the Student as indicated in the IEP with regard to her health issues could best be implemented with the HCP developed by the school nurse. If the Parent had a more positive and trusting belief in the abilities of the Studentôs special education administrator, teacher, aides, and school nurse, the likelihood of the Student being able to progress under the IEP as developed, more and more progress would likely be possible. The IDEA does not require an educational agency or district to have foresight as to all the potential dangers to which a student with as many medical issues as does this Student have, and the dangers they might encounter; however, the regulations implementing the IDEA do require a district to take appropriate action in developing and adjusting an IEP consistent with changes presented to them by students with disabilities. There is evidence in this case that the District has done so.

The question of whether or not FAPE was denied in this case also pertains to the specialized instructional intention of the Studentôs IEP. In more specifically defining what is meant by FAPE, the Court held that an educational agency has provided FAPE when it has provided personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. The Court noted that instruction and services are considered "adequate" if:

(1). They are provided at public expense and under public supervision and without charge;

(2). They meet the State's educational standards;

(3). They approximate the grade levels used in the State's regular education; and

(4). They comport with the student's IEP.[63]

The definition of children covered under IDEA; however, is seen as being doubly circular in

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[63] *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982)

that a child with disabilities must be so disabled as to require special education and related services. Again, as noted above, special education and related services are those that meet the unique needs of a child with disabilities. Moreover, related services are those that assist a child to benefit from special education, which can only be received by a child with disabilities. Even with the extensive disabling conditions that the Student presents with, there was no evidence presented by the Parent that indicated that the District failed to meet both the IDEA and Department standards in developing specialized instructions for the Student.

Keeping in mind, as noted above, FAPE is defined as special education and related services that are provided at public expense, under public supervision and direction, and without charge, which meet the standards set forth by the Department. Thus the question boils down to: (1) looking at each individual issue to determine whether or not the District has been in compliance with that definition, and (2) whether or not any single violation, or the accumulation of violations, is severe enough to constitute a denial of FAPE.

The Court of Appeals for the Eight Circuit in *Zumwalt v Clynes*[64] agreed with the Supreme Courtôs decision in *Rowley* in stating that the IDEA requires that a disabled child be provided with access to a free appropriate public education and that parents who believe that their childôs education falls short of the federal standard may obtain a state administrative due process hearing.[65] Further, Rowley recognized that FAPE must be tailored to the individual child's capabilities. The Court of Appeals for the Eighth Circuit has also outlined the procedural process by which a parent and student may pursue their rights under the IDEA:

> ñUnder the IDEA, parents are entitled to notice of proposed changes in their child's educational program and, where disagreements arise, to an 'impartial due process hearing.' [20 U.S.C. § 1415(b)(2).] Once the available avenues of administrative review have been exhausted, aggrieved parties to the dispute may file a civil action in state or federal court. Id. § 1415(e)(2).ò[66]

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[64] *Zumwalt v Clynes,* (96-2503/2504, U.S. Court of Appeals, Eight Circuit, July 10, 1997)

[65] *Board of Education v. Rowley,* (458 U.S. 176-203, 1982)

[66] *Light v. Parkway C-2 School District*, 41 F.3d 1223, 1227 (8th Cir. 1994), cert. denied, 515 U.S. 1132 (1995)

The Eighth Circuit Court of Appeals has addressed the issue of the adequacy of an IEP in meeting the standards established in IDEA in order to provide FAPE. In *Fort Zumwalt School District v. Clynes*, the majority is quoted as stating that the IDEA does not require the best possible education or superior results. The court further states that the statutory goal is to make sure that every affected student receive a publicly funded education that benefits the student.[67] In their decision the court relied on the previously cited Rowley case by quoting Rowley at 203 (grades and advancement from grade to grade "an important factor[s] in determining educational benefit").[68] The Eighth Circuit has also found that a school district has met their IDEA obligations if a studentôs IEP ñis reasonably calculated to enable the child to receive educational benefits.ò[69]

FAPE cannot be said to have been denied if, as noted above, the instruction and services comported with the Studentôs IEP. In this case the IEP that was developed and implemented by the District contained sufficient indications of specialized instruction in all of the Studentôs academic areas and the testimony by her classroom teacher adequately reflects her knowledge of the Studentôs academic needs.

The issue of procedural violation addressed in this case was the allegation of the Districtôs not having allowed the Parent adequate participation in the development of the Studentôs IEP. According to the Parent this failure on the part of the District was such an egregious violations of the procedural requirements of the Act that she believes the District denied the Student with FAPE.

It was the intent of the IDEA to encourage parental participation in the development of a disabled studentôs IEP. The value of parental participation in the development of an IEP has been consistently emphasized in the IDEA.[70] As the Supreme Court stated in the previously cited Rowley case ñIt seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a

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[67] *Fort Zumult School Dist. v. Clynes*, 96-2503,2504, (8th Cir. 1997)

[68] Ibid, at 26 IDELR 172

[69] *M.M. v Special School Dist*, 512F.3d, 461 (2008) and *Neosho R-V School District v. Clark*, 315F.3d, 1026-27 (2003)

[70] 20 U.S.C. §§ 1400(c); 1401(20); 1412(7); 1415(b)(1)(A), (C)-(E); 1415(b)(2)

substantive standard.ò[71] The previously cited Eighth Circuit case regarding the necessity of there needing to be serious procedural violations in order to declare a violation of FAPE, on the other hand, takes a strong opinion in the other direction when it comes to the requirement of parental participation: "An IEP should be set aside only if 'procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.'"[72] The Eight Circuit also found that an IEP must be found inappropriate and set aside only if ñprocedural inadequacies compromised the pupilôs right to an appropriate education, seriously hampered the parentôs opportunity to participate in the formulation proses, or caused a deprivation of educational benefits.ò[73] Failure on the part of a district to not allow a parent to participate in the development of a studentôs IEP would in and of itself be such an egregious violation.

In this case there is no doubt that the Parent participated in the development of the Studentôs IEP. Additionally, there is a preponderance of evidence in the record showing that she was provided with sufficient notice and that even with limited attendance progress was made by the Student. Again, the degree of frustration the Parent experienced regarding her desire for a one-on-one aide being assigned just to the Student and other perceived health violations by the assigned staff most likely led to her request for a due process hearing. Her testimony as well as the documents presented as evidence reflect a history of active involvement in the Studentôs health, welfare, and education which can only be admired by those of us without such challenges as those that she meets daily.

Also, as noted earlier, the courts have agreed that an IEP must be designed to provide the possibility for a student to obtain an educational benefit from the proposed instruction. What constitutes an educational benefit or meaningful benefit has also been the discussion of multiple court decisions. Again, going back to the Rowley standard, progress according to the courts should be measured in terms of educational needs of the disabled child and should be more than

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[71] *Bd. of Educ. of Henrick Hudson Cent. Sch. Dist. v. Rowley*,458 U.S. 176, 189, 205 (1982)

[72] *Independent School District No. 283 v. S.D. by J.D.*, 88 F.3d 556 (8th Cir. 1996) and *J.P. v. Enid Public School*, No. CIV-08-0937-HE (W.D. Okla. 9-23-2009)

[73] *Independent School District No. 283 v. S.D.*, 88 F.3d, 556-561 (1996)

ñtrivialò or ñde minimis.ò[74] In evaluating whether FAPE was furnished the courts have demanded an individual inquiry into a childôs potential and educational needs. In this case the Studentôs academic progress, although less than would be desired by either her teacher or the Parent, was shown to be more than trivial or de minimis when measured against the extensive limitations placed on the Student by her multiple disabilities. It is not a mandate of the IDEA that a parent, anymore than a district, be able to forecast with ultimate certainty of the adequacy of a particular IEP. The IEP, as noted above, must however, be developed in such a manner as to allow a student the opportunities to achieve an educational benefit from the educational program. From the documents entered as evidence and the testimony of the educational professionals this would appear to be the case for this Student, even though as noted she may not have achieved academically to the degree believed possible by the District or the Parent.

The Supreme Court supported Congressôemphasis on the importance of procedural compliance; however the accusation that a student has been denied FAPE has not been supported by the court when the alleged violation has been based solely on procedural violations.[75] Case law attempting to interpret both Congress and comply with the findings of the Supreme Court have stated that procedural errors are sufficient to deny FAPE if such errors ñ[1] compromise the pupilôs right to an appropriate education, [2] seriously hampered the parentsôopportunity to participate in the formulation process, or [3] caused a deprivation of educational benefits.ò[76] The alleged violation of not following the IDEAôs due process procedure by not providing the Parent with her request for a one-on-one aide was not shown by the evidence or testimony to warrant a judgement that the District failed to follow due process procedures in regard to the allegation. Thus in this

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[74] *Polk v. Central Susquehanna Intermed. Unit 16*, 853 F.2d 171 (3rd Cir. 1988); *Ridgewood B. of Educ. v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); and *Houston Indep. Sch. Dist. v. Bobby R.,* 200 F.3d 341 (5th Cir. 2000)

[75] *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 206-207 (1982). See also *Evans v. District No. 17 of Douglas Cou*nty, 841 F.2d 824 (8th Cir.1988). (See also *Independent School District No. 283 v. S.D. by J.D.*, 88 F.3d 556 (8th Cir. 1996). See also: *Hiller v. Board of Education*, (16 IDELR 1246) (N.D. N.Y. 1990); *Bangor School Department* (36 IDELR 192) (SEA ME 2002); *Jefferson County Board of Education*, (28 IDELR 951) (SEA AL 1998); *Adam J. v. Keller Independent School District*, 328 F.3d 804 (5th Cir. 2003); *School Board of Collier County v. K.C..*, 285 F. 3d 977 (11th Cir. 2002), 36 IDELR 122, *aff'g* 34 IDELR 89 (M.D. Fla. 2001); and *Costello v. Mitchell Public School District 79,* 35 IDELR 159 (8th Cir. 2001).

[76] Roland M. V. Concord Sch. Comm. 910 F.2d 994 (1st Cir 1990); accord Amanda J. ex rel. Annette J. V. Clark Cnty. Sch. Dist., 267 F.3d 877,892 (9th Cir. 2001).

case the Parent has failed to demonstrate that the decision of the District to not include her request for a one-on-one aide was not a denial of her right to participate in the development of the Studentôs IEP.

Order

The results of the testimony and evidence warrant a finding for the District. There is not sufficient evidence to warrant a denial of FAPE as alleged by the Parent. This case is hereby dismissed with prejudice.

The Parent is hereby encouraged to allow the District the continued opportunity to provide the Student with the educational opportunities for which she has been provided the right to receive under the IDEA as a child with multiple disabilities.

Finality of Order and Right to Appeal

The decision of this Hearing Officer is final and shall be implemented unless a party aggrieved by it shall file a civil action in either federal district court or a state court of competent jurisdiction pursuant to the Individuals with Disabilities Education Act within ninety (90) days after the date on which the Hearing Officerôs Decision is filed with the Arkansas Department of Education.

Pursuant to Section 10.01.36.5, *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education 2008, the Hearing Officer has no further jurisdiction over the parties to the hearing.

It is so ordered.

Robert B. Doyle, Ph.D.
Hearing Officer

October 26, 2012
Date